

IN THE HIGH COURT OF BOMBAY AT GOA

FIRST CIVIL APPEAL NO.63 OF 1993

Lina Cassiana Correia dos
Martyres, resident of
Sataporio, Moira

...APPELLANT

versus

1. Condorcet Nolasco Correia,
deceased, through his legal
representatives

i) Mrs. Valdermina Mascarenhas;

ii) Luis Mascarenhas, deceased
through his legal repre-
sentatives:

a) Mrs. Beryl Sundam;

b) Edwin Sundam,

both residents of 5/53
Ring Street, Wellstoncraft,
N.S.W. 2060, Australia;

c) Mrs. Amy D'Souza;

d) Hector D'Souza;

both residents of B-19,
New Barkeley Place,
Byculla, Bombay;

e) Mrs. Celie Drakes;

f) Spiro Drakes,

Both residents of 134,
Prince Edward Avenue,
Earswood, N.S.W.2206,
Australia;

g) Mrs. Daisy Freitas

h) Roland Freitas,

both residents of 30,
Whitton Road, Chatswood,
N.S.W. 2067, Australia;

i) Miss Elizabeth Mascarenhas,
resident of 'Miralou'
Bella Vista, Sangolda;

iii) Mrs. Hilda Afonso;

- iv) Mrs. Martha Maciel;
- v) Lazarus D'Cunha;
- vi) Mr. Almiro D'Cunha
 - (a) Mrs. Maureen D'Cunha;
both residents of Canada;
- vii) Miss Melanie D'Cunha;
- viii) John D'Cunha,
 - a) Mrs. Magdalena
D'Cunha, resident
of Bombay;
- ix) Jose B. Correia;
- x) Iris Correia;
- xi) Leena Correia;
- xii) Roberto J. Correia;
- xiii) Mrs. Joyce Correia;
- xiv) Ernesto Nicolau Correia;

2. Anita de Souza, resident
of Sataporio, Moira

...RESPONDENTS.

Shri S.G. Dessai, Senior Advocate, with Shri S.D.
Padiyar, Advocate, for the Appellant.

Shri S.D. Lotlikar, Senior Advocate, with Shri
A.D. Bhoje, Advocate, for the Respondent No.2.

CORAM : A.S. AGUIAR, J.

Date of reserving the
Judgment:-January 10, 2001.

Date of pronouncing the
Judgment:-February 8, 2002.

JUDGMENT

Heard the learned Advocates.

The Appeal is directed against the Judgment and decree passed by the Civil Judge, Senior Division, Mapusa in Special Civil Suit No.36 of 1980 whereby the said suit was dismissed.

2. Some relevant facts:

The Plaintiff/Appellant filed a suit claiming to be the co-owner of the properties described in Para 1 of the plaint. The said properties were surveyed under Survey No.147/7, 147/9, 146/10, 147/13, 146/31 and 147/12. It is averred by the Plaintiff that the Defendant No.1 (Respondent No.1) was selling a portion of one of the properties along with the house. Hence the Plaintiff's brother Jose Brasiliano Correia filed Special Civil Suit No.11 of 1979 along with Miscellaneous Application also bearing No.11 of 1979, for temporary injunction restraining the Defendant No.1 from selling the property. The said Defendant No.1 in the said suit undertook not to sell the property and the said suit was disposed of accordingly with the said undertaking on 9th August, 1979. However, despite the said undertaking and order of the Court, the Defendant No.1 mortgaged to the Defendant No.2 the house

with the property for Rs.20,000/- ostensibly lent to him by the said Defendant No.2. The plaint also averred that Defendant No.1 gifted to Defendant No.2 all other properties referred to at Items No.1 to 5 in Para 1 of the Schedule, which properties were the subject-matter of the inventory proceedings.

3. It is the contention of the Plaintiff/Appellant that Defendant No.1 had no right to mortgage or gift the said properties to Defendant No.2 without permission/consent of the other co-owners. It is further contended that the suit properties formed part of the estate of the deceased Nonato de Correia and in inventory proceedings No.86 of 1978, the Court of Civil Judge, Senior Division, Mapusa allotted some of the suit properties to the Plaintiff, details of which are set out in Para 9(a) of the plaint. Plaintiff, therefore, claims to have acquired absolute title in the suit properties in view of the allotment of the suit properties to her in the inventory proceedings and in the wake of these facts, the Plaintiff initiated the present dispute by filing suit being Special Civil Suit No.36 of 1980 for declaration and possession in which the above impugned order was passed.

4. The Defendants No.1 and 2 resisted the Plaintiff's claim and have each filed separate written statements.

5. In his written statement the Defendant No.1 claimed that he was the owner of the suit property by title and claimed to be an exclusive owner of the suit property for over 40 years without any interference from anybody and, therefore, set up title to the suit properties by way of adverse possession.

6. Defendant No.2 in her written statement took up the defence that the suit was bad for non-joinder of necessary parties; that the Plaintiff, being a British National, could not file the suit without obtaining prior permission from Reserve Bank of India; that the Defendant No.1 was the exclusive owner in possession of the suit property before executing the mortgage deed and the gift deed and, therefore, the said property was rightly transferred to her name.

7. The trial Court on the basis of the pleadings of the parties framed the following Issues:

1. Whether the plaintiff proves that the properties referred to in paragraph 1 of the plaint belong to the plaintiff, to the defendant no.1 and to several other persons ?
2. Whether the plaintiff proves that the mortgage deed by which the defendant no.1 mortgaged in favour of the defendant no.2 the house property referred to in paragraph 1 of the plaint, is null and void ?
3. Whether the plaintiff proves that the deed by which the defendant no.1 gifted to the defendant no.2 all the remaining properties mentioned in paragraph 1, is null and void ?
4. Whether the defendant no.1 proves that all the suit

properties were enjoyed by him exclusively, peacefully and uninterruptedly with animus Domini for more than 40 years, having acquired right to them by prescription ?

5. Whether the defendant no.2 proves that the suit is bad for non-joinder of the plaintiff's husband ?
6. Whether the defendant no.2 proves that all the alleged co-owners of the suit property should be made parties to the suit ?
7. Whether the defendant no.2 proves that the plaintiff should pay Court fee on the value of Rs.25.000/- in addition to the other reliefs prayed in the suit?

8. The Plaintiff in the suit while claiming to be a co-owner in possession of the suit properties along with the Defendant No.1 and others, sought a declaration that the mortgage deed and the gift deed are null and void and also sought recovery of possession of the said property from Defendant No.2, who claimed to be in possession under the deed of mortgage and the gift deed.

9. The Plaintiff also claimed that the suit properties were allotted to her in inventory proceedings on 15-3-1983 and, as such, she has become exclusive owner and title holder of the suit properties. It is pointed out that the allotment of the said properties was not challenged by Defendant No.2 or any other aggrieved person and, therefore, the allotment had become final.

10. In view of the above, on 8-3-1984 the Plaintiff amended the plaint claiming to be the sole owner of the properties on the basis of order in the inventory proceedings and in reply thereto, on 6-8-1984, an additional written statement was filed by Defendant No.2. On the amended pleadings, an additional issue, being

Issue No.8 was framed, namely:

VIII. Whether the Plaintiff
acquired absolute title
to the suit properties ?

Two other Issues, 9 and 10, were also
framed:-

IX. Whether the Defendants
prove that the Plaintiff
is entitled to hold
property, though she is a
foreign national ?

X. Whether the suit is bad
for nonjoinder of her
husband ?

11. On 16-11-1984 the Defendant No.1
expired and his heirs were brought on record.
However, none of the heirs of Defendant No.1 have
appeared in Court at any time. Hence the suit
proceeded ex-parte against them.

12. The trial Court, after recording evidence of the parties, dismissed the suit holding that the Plaintiffs have failed to prove that the properties referred to in Para 1 of the plaint belonged to the Plaintiff, Defendant No.1 and other co-owners and also held that the Plaintiff failed to prove the mortgage deed in favour of Defendant No.2 was null and void. The trial Court also held that the Plaintiff had failed to prove that the deed by which the Defendant No.1 gifted to Defendant No.2 all the remaining properties mentioned in Para 1 of the Schedule was null and void. Further, the trial Court held that the suit was bad for non-joinder of all parties as all co-owners of the properties in question were not impleaded as parties to the suit. Thus, it appears that the trial Court had recorded adverse findings against the Plaintiff on all Issues and hence the suit by the impugned Judgment and decree dated 22nd March, 1993, came to be dismissed.

13. The trial Judge dismissed the suit, inter alia, on the following grounds:-

(1) That there are contradictions in the case set out by the Plaintiff in Para 1 of the

plaint and Para 10(a) and (b) of the plaint;

(2) That the Plaintiff has failed to explain as to how the share of Defendant No.1 was allotted to her when the Defendant No.1 had already mortgaged and gifted the suit properties to Defendant No.2;

(3) That the Plaintiff had not sought any declaration that she was the co-owner of the suit properties or absolute owner of the properties and without seeking such declaration, Plaintiff's suit was not maintainable;

(4) That the Plaintiff had not challenged the Survey entries made in favour of Defendant No.1 nor had the other co-owners objected to the same;

(5) That the Plaintiff had not proved that the two documents were sham documents; and

(6) That the Plaintiff had admitted the right of Defendant No.1 to the suit properties.

The matter was taken in appeal and a Single Judge of this Court allowed the Appeal.

However a Division Bench of this Court in Letters Patent Appeal No.12 of 1996 remanded the matter back to the Single Judge for disposal of the appeal according to law.

14. On a rehearing before this Court from the said impugned Judgment and decree, the learned Advocates for the respective parties have made oral and filed written submissions. On behalf of the Appellant/original Plaintiff, it has been contended that the suit is essentially framed under Section 31 of the Specific Relief Act, 1963, as the Plaintiff had reasonable apprehension that the documents, namely, the deed of mortgage and deed of gift, which were allegedly concocted documents, if left outstanding, would cause serious injury and, therefore, the Plaintiff is entitled to have the said documents/instruments declared void or voidable. The reason for filing the suit for cancellation of documents was to remove the cloud on the title of the Plaintiff to the said property caused not by the assertion of title by the executant Defendant No.1, but by the mere fact of execution of the said documents by Defendant No.1 in favour of Defendant No.2. It is the contention of the Plaintiff that the gift

deed and mortgage deed are void as the Plaintiff is co-owner of the said properties and after the 1978 inventory proceedings, when the said properties were allotted to her, as exclusive owner of the said properties. Hence the said Defendant No.1 could not have either mortgaged or gifted the said properties to a third person. It is pointed out that the said instruments, deed of mortgage and the gift deed, were executed by Defendant No.1 in favour of Defendant No.2, a total stranger to the properties.

15. It is further contended that since the Defendant No.1 and the Defendant No.2 were joined as parties to the suit as they were necessary parties to the suit and it was not necessary for the Plaintiff to have joined anybody else for the purpose of obtaining the relief sought in the suit. Hence, the suit could not have been dismissed for non-joinder of other parties nor could the suit be dismissed for non-joinder of the husband of the Plaintiff as the husband of the Plaintiff was not necessary party to the suit, or for not bringing some of the heirs of the deceased Defendant No.1 on record, since, if there are two or more heirs and legal representatives of the deceased party and one or

more has been brought on record within time, the suit or appeal does not abate on the ground that all the legal representatives have not been brought on record. The said persons were not necessary parties as they were not required for effective adjudication of the dispute in the suit.

16. It is further contended that there is no inconsistency in the pleadings and, therefore, the dismissal of the suit on the said ground is wrong. At the time of the filing of the suit it was clarified that the Plaintiff had claimed to be co-owner of the suit property along with Defendant No.1 and other heirs. Subsequently, since the said properties were allotted to the Plaintiff on 15-3-1983 in the inventory proceedings of 1978, she became the exclusive owner thereof. Hence amendment was necessitated and the amendment was granted on the basis of which further issue, namely, Issue No.8 was framed. It is contended that for the purpose of obtaining the relief under Section 31, it was not necessary for the Plaintiff to prove that Plaintiff was co-owner or exclusive owner. However, the trial Court has failed to give a finding whether the Plaintiff was co-owner or

exclusive owner for the purpose of granting the reliefs claimed in the suit.

17. It is further contended that the Plaintiff had produced the title documents of the suit properties, namely, the allotment order dated 15-3-1983 in the inventory proceedings of 1978, whereby the suit properties were allotted to her. The said title documents produced by the Plaintiff have not been countered or controverted or disproved by any of the adverse parties and hence, the order passed in the inventory proceedings is binding upon Defendant No.1 and/or his heirs and, consequently, also upon Defendant No.2.

18. It is further contended that Defendant No.1 had failed to prove that the suit properties were adversely possessed by him as no evidence was led to prove the same. The evidence of Defendant No.2 has not proved the ownership of the properties in favour of Defendant No.1 by title or otherwise. On the other hand, documentary evidence has been produced by the Plaintiff, namely, the 1915 inventory order showing that the suit properties belonged to the grandparents of the Plaintiff and the devolution

of the said properties upon their heirs including the father of the Plaintiff and also the subsequent document of title of the inventory Court allotting the said suit properties to the Plaintiff in inventory proceedings of 1978. These documents have not been controverted or rebutted by the Defendants. It is contended that the learned trial Judge has failed to consider this material documentary evidence proving the title of the Plaintiff either as a co-owner or absolute owner.

19. It is the submission of the learned Advocate for the Appellant that Issues No.5, 6 and 10 are, in fact, irrelevant for the purpose of deciding the suit or the actual controversy in the suit. The real issues are Issue No.4 and Issue No.1 or, alternatively, Issue No.8. It is contended that Issue No.4 i.e. "Whether the Defendant No.1 was the owner by adverse possession of the suit properties?" has been rightly decided against Defendant No.1. However, the learned trial Judge has not properly answered Issues No.1 and 8 and has not even discussed the merits of the said Issues.

20. It is the contention of the learned

Advocate for the Appellant that the four documents, namely the will, lease deed, mortgage deed and the gift deed, are ex facie fraudulent. It is pointed out that when the said documents were executed, the Defendant No.1 was 86 years old and the said documents were executed one after another in quick succession by Defendant No.1 favouring a total stranger, Defendant No.2, to the exclusion of his kith and kin. It is pointed out that by will dated 22-1-1980 five of the suit properties were bequeathed to Defendant No.2 by Defendant No.1 and another property, the sixth property, was also leased on the same date. However, within a short span of just a month the Defendant No.1 mortgaged the sixth property leased earlier on 22-1-1980 and also gifted the five properties which were earlier willed in favour of Defendant No.2 by a will executed on 21-2-1980. The sequence of events makes the documents highly suspect since, when there was a will, where was the necessity of making a gift of the said properties and where was the need for executing a mortgage in respect of the said leased properties. It is further pointed out that the only incident that took place prior to the filing of Civil Suit of 1980 in which the impugned decree

was passed, was the institution of Special Civil Suit No.11 of 1979 by the brother of the Plaintiff against the Defendant No.1 wherein the Defendant No.1 gave undertaking to the Court not to alienate the sixth property which he had earlier leased in favour of Defendant No.2. After filing of the said suit by the Plaintiff's brother, the Plaintiff also instituted inventory proceedings claiming the suit properties. It is, therefore, contended that the said four documents were got executed by the Defendant No.2 taking advantage of the old age of Defendant No.1 and by exercising undue influence in order to see that the suit properties were somehow transferred in her favour despite knowing that the brother of the Plaintiff had started claiming to be the co-owner of the suit properties. It is further contended that it could not be said that Defendant No.2 was not aware of Special Civil Suit No.11 of 1979, since it is her case that the Defendant No.1 was being looked after by herself and her mother since the year 1972. The aforesaid circumstances, therefore, show that the Defendant No.2 was in a position to exert undue influence, coercion and pressure on Defendant No.1 who was an old man of 86 years at the time of executing the said impugned documents.

21. Furthermore, it is contended that possession of one co-owner cannot by itself be adverse to the other co-owners. On the contrary, possession of one co-owner amounts to possession by all co-owners unless it is established that the possession of the co-owner amounts to a denial of title of the other co-owners and the possession of that co-owner is hostile to the other co-owners by their exclusion from the said property.

22. It is further contended that Article 1566 of the Portuguese Civil Code refers to preferential rights of a co-owner and prohibits a co-owner from selling his indivisible and undivided share in the property to a third party unless option is first offered to the other co-owners and the other co-owners fail to exercise their option by purchase of the said property. The said Article also provides for quashing of sale deed in favour of a stranger. Further, it is pointed out that Article 2177 of the Portuguese Civil Code prohibits a co-owner from disposing specifically his co-ownership rights without the same being first allotted to him in a partition.

23. It is finally contended that the trial Judge had not considered the documentary evidence on record relating to the said property for the purpose of deciding the suit despite the Plaintiff having proved beyond all reasonable doubt that she is the title holder of the suit properties, at least as a co-owner if not an absolute owner. That the Defendants had failed to prove that the Defendant No.1 was the absolute owner of the suit property by adverse possession and, therefore, the reliefs as prayed for had to be granted and decree in terms of the said prayers had to follow as a matter-of-course.

24. On the other hand, the learned Advocate for the Respondents/original Defendants, submitted that the case argued before this Court by the Appellant is beyond the pleadings and, therefore, ought not to be considered. It is pointed out that the Appellant has nowhere pleaded that the suit properties which he had described in Para 1 of the plaint were the subject-matter of any inventory proceedings held in the year 1915, upon the death of Jose Lino Correia. Therefore, the Plaintiff/Appellant is precluded from contending that the suit properties were the subject-matter of the

inventory proceedings of the year 1915 and that they were allotted to her father or grandmother. Such a case is **de hors** the pleadings and, therefore, ought not to be considered. It is further pointed out that the Plaintiff had merely averred in the plaint that she was owner and in possession of the properties described in Para 1 o the plaint, jointly with other co-owners, i.e. her brothers and sisters-in-law and also Defendant No.1 and his nephews and nieces through his brother and sister. That the only case pleaded by the Appellant in the plaint is that she is co-owner of the suit property along with Defendant NO.1 and others. That there is not a whisper as to how she became co-owner of the suit properties along with Defendant No.1 whose right in the suit properties she has categorically admitted. It is further pointed out that since the Plaintiff has not pleaded that the suit properties were subject-matter of an inventory proceedings of 1915, it was not permissible for her to contend that she has become co-owner of the suit properties by virtue of the allotment made in the inventory proceedings of 1915 and that mere production of the documents of inventory of the year 1915 cannot advance the case of the Plaintiff. Relying upon the

observations of the Supreme Court in AIR 1979 SC 1652, it is contended that "if there is no pleading raising the question, there is no question of proving something which is not pleaded. It is well settled that the allegation which is not pleaded, even if there is evidence in support of it, cannot be examined if the other side has no notice and, if entertained, would tantamount to granting an unfair advantage to the party....."

25. The next contention of the Respondents is that the Appellant has failed to establish the co-relation between the properties which were subject-matter of 1915 inventory proceedings and the suit properties. It is contended that it is not possible for the Appellant to make out any case of co-ownership without correlating the suit properties with the properties allotted under the inventory proceedings of 1915.

26. In connection with all the four documents impugned by the Plaintiff, it is contended by the Respondents that the Defendant No.1 died at the age of 92 years i.e. 6 years after the execution of the said documents. That the only challenge to the documents is the right

of the Plaintiff to mortgage/gift the said properties, as he was only a co-owner thereof. The authenticity of the said documents has, however, not been challenged. There is no challenge to the said documents on the ground of either undue influence or fraud. It is further pointed out that there is no challenge in the plaint to the will nor is there any reference in the plaint to the lease in respect of the house situated in the suit property.

27. In connection with the frame of the suit, it is pointed out that the contention of the Plaintiff that the suit is under Section 31 of the Specific Relief Act is misconceived. It is pointed out that the suit merely seeks a declaration that the gift deed and the mortgage deed are null and void. The suit is not for cancellation of the said documents as contemplated under Section 31 of the Specific Relief Act, 1963 and, therefore, the trial Court was right in holding that the Plaintiff's suit is not maintainable under Section 31 of the Specific Relief Act, 1963 because the Plaintiff had to first establish that she is the co-owner of the property and based on such proof of co-ownership, she had to seek nullity of the said documents on

the ground that her consent was not obtained. The suit, according to Respondents/Defendants is one essentially for a declaration and falls under Section 34 of the Specific Relief Act, 1963. Similarly, in respect of declaration of nullity of mortgage deed, the suit is liable to fail on the ground that the Plaintiff had failed to seek consequential reliefs even though available.

28. With reference to the case of the Plaintiff that she became exclusive owner of the suit properties pursuant to the allotment in her favour in inventory proceedings of 1978, it is pointed out by the Respondents that the said inventory proceedings were in respect of the estate belonging to her father Nonato D.C. Correia. However, it was never the case of the Plaintiff in the plaint that any of the suit properties belonged to her late father. On the contrary, it is her specific case that the suit property belonged to her jointly with Defendant No.1 along with nephews and nieces, since her brother and sister are since deceased and, therefore, she could not have become the exclusive owner of the suit properties pursuant to the allotment made in her favour in the inventory proceedings initiated by her upon the

death of her father to which, admittedly, neither the Defendant No.1 nor the other co-owners of the suit properties were parties. Furthermore, the allotment of the suit properties to the Plaintiff in proceedings in which neither of the Defendants was a party, is absolutely irrelevant and of no consequence, as the same cannot bestow any right on the Plaintiff nor can take away any rights of the Defendants to the said properties and, therefore, it was not necessary for the Defendants to have challenged the said allotment.

29. With reference to the Appellant's contention that the trial Court held that Defendant No.1 had failed to prove the suit properties were adversely possessed by him as no evidence was led by Defendant No.1 and/or his heirs on this issue or any other issue cast upon him as heir, it is contended that the findings on the said Issue No.4 against the Defendant No.1 are irrelevant and cannot advance the case of the Plaintiff. It is contended that the issue was not, in fact, to be considered by the trial Court at all inasmuch as the said issue would fall for consideration only in case the Plaintiff had succeeded in establishing her co-ownership rights or absolute ownership rights in the said

properties. Since the Plaintiff failed to establish either her co-ownership rights or absolute ownership in any of the suit properties, as the same has been specifically held by the trial Court by answering the Issue No.1, Issue No.4 was not required to be determined at all. The Plaintiff cannot take advantage of the weakness or inability of the Defendant to prove his case if the Plaintiff himself has failed to discharge the burden of proving his case by satisfactory evidence, as in the present case neither the Defendant No.1 nor the Defendant No.2 were required to prove anything. It is further pointed out that it is pertinent to note that the Plaintiff has in the plaint admitted the interest of Defendant No.1 in the suit properties as a co-owner and, therefore, the Defendant No.1 was not required to prove anything and it was for the Plaintiff to prove her interest in the suit properties. It is further contended that it is admitted that Defendants No.1 and 2 were in possession of the suit properties and possession is good title against the whole world except against the true owner. In the present case, the Defendant No.1 had ownership as well as possession as per the case set up by the Plaintiff herself. The Record of Rights reflects

the case of Defendant No.1 as sole occupant of the suit properties. There is a presumption of correctness of entries in the Record of Rights. This presumption was required to be rebutted by the Plaintiff by adducing satisfactory evidence. The Record of Rights shows the lawfulness of possession of Defendant No.1. This was required to be rebutted by the Plaintiff which the Plaintiff has failed to do and, therefore, the trial Court has rightly held that the Plaintiff had failed to prove her case and was not entitled to any relief.

30. It has been the contention of the Appellant/Plaintiff that it was not necessary to identify the suit properties to correlate them with the 1915 inventory proceedings, since the Defendants had not raised any dispute regarding the suit properties or their identification. It is, however, pointed out by the Respondents that the Plaintiff made no reference to the 1915 inventory proceedings in the plaint nor it is stated that the suit properties or any of them were the subject-matter of the 1915 inventory proceedings. Hence there was no occasion for either of the Defendants to dispute the fact that the suit properties were the subject-matter of

1915 inventory proceedings. Moreover, it is pointed out that from the description of the properties in the inventory of 1915 and the description as given of the suit properties, it is ex facie clear that there is no correlation between the two and the Plaintiff has made no efforts to establish such correlation. It is pointed, in her deposition the Appellant/Plaintiff has stated that only one of the properties of 1915 inventory proceedings was allotted to her father and the others were allotted to other brothers and widow. It is, therefore, difficult to understand as to how all the suit properties suddenly became the properties of the father to be allotted to the Plaintiff in the inventory proceedings she had initiated upon the death of her father. It is further pointed out that the Plaintiff has described the suit properties as the properties belonging to her father's estate only after the institution of the suit and, apparently, she has borrowed the description as given in the documents which she had challenged, namely, the mortgage deed and the gift deed.

31. In connection with the challenge to the four impugned documents, it is contended by the

Respondents that neither the lease deed nor the will has been challenged in the plaint. The other two documents, namely, the gift deed and the mortgage deed have not been challenged on any ground except on the ground that as co-owner, the Defendant No.1 could not have executed the said documents. It is contended that it is not permissible for the Plaintiff to raise the challenge on grounds not pleaded in the plaint. There is no basis for the challenge and the documents cannot be challenged on the basis of surmises and conjectures. In conclusion, it is submitted by the Respondents that the trial Court has referred to all the relevant documents and has rightly come to the conclusion that the Plaintiff has miserably failed to establish her case and the suit, therefore, has been rightly dismissed.

32. From the rival contentions and submissions as aforesaid, the following points arise for my consideration, namely:

(1) Whether the learned trial Judge has rightly rejected the suit on the ground that there are contradictions in the case set up by the Plaintiff in Para 1 of the plaint and Para

10(a) and (b) of the plaint and the statement of the Plaintiff ?

(2) Whether the trial Court has correctly appreciated the evidence in deciding Issue No.1 in the negative, namely, "Whether the Plaintiff proves that the properties referred to in Para 1 of the plaint belonged to the Plaintiff, Defendant No.1 and several other persons" ?

(3) Whether the trial Judge has rightly answered Issues No.2 and 3 also in the negative, namely, "Whether the Plaintiff proves that the mortgage deed and the deed of gift in favour of Defendant No.2 are null and void ?

(4) Whether the trial Judge has rightly answered Issues No.5 and 6 in the affirmative holding that the suit is bad for non-joinder of the Plaintiff's husband and non-joinder of the other co-owners of the suit properties ?

(5) Whether the trial Court has rightly negatived Issue No.4, viz the contention of the Defendant No.1 that all the suit properties were enjoyed by him exclusively, peacefully and

uninterruptedly with animus domini, for more than 40 years, having acquired right to them by prescription ?

(6) Whether the trial Court has rightly negatived Issue No.8, viz. the contention of the Plaintiff that the Plaintiff had acquired absolute right to the suit properties ?

and

(7) Whether the suit is maintainable not being one under Section 31 of the Specific Relief Act ?

33. It must be pointed out that the points for consideration at Sr. Nos.1, 4 and 7 involve pure questions of law. Points at Sr. No.2, 5 and 6 involve questions of fact. Point No.3 involves mixed questions of law and fact.

34. Dealing with the points No.2 and 6 (Issues No.1 and 8 in the suit), the learned Trial Judge has referred to the averments in Para 1 of the plaint where the plaintiff claims as co-owner along with Defendant No.1 and other heirs. The learned Judge has noted that the

averments in Para 1 of the plaint are contrary, if not contradictory, to the averments in Para 10-A and 10-B of the plaint. In support of her contention that she is the co-owner of the said properties, the Plaintiff (P.W.1) has in her deposition, stated that the original Defendant is dead and that all the five properties belonged to her father Nonato Correia and on his death, inventory proceedings No.86 of 1978 were initiated and the said properties were allotted to her. In support of her contention, she has produced copy of judgment in inventory proceedings dated 15-4-1983 (Exh.P.W.1/A). The learned trial Judge has observed that the Plaintiff has not explained how the said properties could be allotted to her in the inventory proceedings when she herself has admitted that the Defendant No.1 with other heirs have shares in the suit properties. Furthermore, since the Defendant No.1 had already mortgaged and gifted the said properties to Defendant No.2, the same could not have been allotted to her in the inventory proceedings. It is noted by the learned trial Judge that the Plaintiff had in her cross-examination conceded that she had filed list of assets on 21-9-1982 in the inventory proceedings on the death of the father, i.e.

after the mortgage deed and the gift deed were executed by Defendant No.1. She has also admitted that the inventory proceedings were not contested. On the basis of the said admission, the learned trial Judge came to the conclusion that the Plaintiff had in the inventory proceedings concealed the fact pertaining to the mortgage deed and the gift deed of the suit properties by Defendant No. 1 in favour of Defendant No.2 and that since both those documents were sub judice in the Civil Court, the properties could not have been allotted to any of the interested parties. It has been further observed by the learned trial Judge that the Plaintiff has not mentioned the names of the other legal heirs, co-owners in the said properties and, in fact, in her cross-examination the Plaintiff (P.W.1) has admitted that she does not know the names of the other heirs of the deceased Defendant. But surprisingly, the trial Judge has held that the Plaintiff has failed to prove both the issues because she has not sought declaration that she was co-owner of the suit properties or that she is the absolute owner of the suit properties and without seeking such declaration, the Plaintiff's suit is not maintainable under law. Reliance has been placed

upon the observations in the case of **Vamula Maniamma v Allugada Venkatamma and others** (AIR 1984 NOC 80 (Andhra Pradesh)). In other words, the learned trial Judge has decided Issues No.1 and 8 (points for determination No.2 and 6 herein) as an issue of law. No finding has been given by her on the evidence adduced by the Plaintiff (P.W.1) in support of her claim to title of the properties as co-owner or as absolute owner.

35. The Plaintiff in support of her claim to co-ownership and/or absolute title in view of the allotment in the inventory proceedings of 1978, has set out the following facts:-

The original owner of the properties referred to in para 1 of the plaint was Jose Luis Correia, who died on 23rd April, 1915. He married with Maria Claudia Correia under the community of assets and thereby under the Portuguese marriage law, Maria Claudina Correia became the owner of half share of the estate on the death of her husband. Maria Claudina

Correia died on 14th December, 1963.

After the death of Jose Luis Correia, his widow Maria Claudina Correia instituted Inventory Proceedings no.8478/15. The late Jose Luis Correia and his wife Maria had 5 issues:-

1. Daughter...Artimisia Sebastiana Correia, being married to one Pedro Joao Da Cruz;

2. Son...Victor Sebastiao Correia, bachelor;

3. Son...Nonato Damiao Correia, Plaintiff's father;

4. Son...Condorcet Nolasco Correia, bachelor, late defendant no.1 died on 16-11-85 at the age of 91 and

5. Daughter...Eugenia Diolinda Correia, was a minor.

The translated copy of the Certificate issued by the Civil Judge, Senior Division, Mapusa, in respect of the Orfanological Inventory No.8478/915, Claudina Soares of Moira, Head of the family vs. Jose Luis Correia, deceased, is at page 50 of the compilation. On page 53 and 54 of the compilation, in the certificate all the properties left by the deceased Jose Luis Correia are detailed as follows:-

"Immovable properties -

Item no.12: Property by name Gorbata in which there is a residential house, situated at Moira, bounded on the east by the heirs of Antonio Vicente Santana de Noronha, and of Pascoal Joao de Noronha. On the west by Antonio Francisco de Noronha and others, on the north by the heirs of the said Antonio Vicente and on the south by the said Antonio Francisco valued

at two hundred rupees. Item no.13:
Property Gorbata, consisting of
four portions: the first one,
bounded on the east by way, on the
west by property of Fr. Gabriel
Correia and brother on the north by
Vitorino Salvador Lobo and on the
south by aforamento fralde of first
fod of the deceased; the second
one, on the east by Minguel Antonio
de Souza, on the west by Vitorino
Salvador Lobo, on the north by the
heirs of Joaquim Paulo Correia and
on the south by Fr. Gabriel
Correia and brother; the third
one, on the east, west and south by
ways and on the north by Fr.
Gabriel Correia and brother; and
the fourth one, on the east and
west by ways, on the north by
Vitorino Salvador Correia and on
the south by the heirs of Pascoal
Joao Correia, twenty rupees.

Item No.14: Property by name
Molly, consisting of four
portions, the first one, bounded on

the east by the Comunidade of Moira, on the west by way, on the north by the heirs of Caetano Pascoal Nazare and on the south by Vicente Simao Michael, the second one on the east and west by ways, on the north by Fr. Gabriel Correia and brother and on the south by Vitorino Salvador Lobo, the third one, on the east by way on the west and north by Fr. Gabriel Correia and brother and on the south by Vitorino Salvador Lobo and the fourth one, on the east by Antonio Caridade Maciel, on the west by the Comunidade of Ucassaim, on the north by Miguel Antonio de Souza and on the south by Vicente Simao Maciel, twenty rupees.

Item No.15 - Property of aforamento of land by name Fralda of first fod, bounded on the east and south by ways on the north by the first portion of the property Gorbata of the deceased and on the west by Fr. Gabriel Correia and

brother, ten rupees.

Item No.16 - Property composed of two aforamentos by name Segundo Fod, which being adjoining form only one property bounded on the east by Idalina de Sequeira, wife of Gregorio Rosario Veloso and Maria Piedade Noronha, on the west by Querobina Fernandes, on the north by way and on the south by drain, valued at one hundred rupees.

Item no.17.- Aforamento property by name Baile Motto, bounded on the east by Crisologo Sequeira on the west by way, on the north by land reserved for way five metres wide, valued at seventy five rupees. All the said properties situated at Moira and not described in the Land Registration Office."

In her evidence P.W.1 has stated:

"From 1929 to 1961 deft. no.1 was in Africa. He came in 1961. Initially all the said survey nos. were recorded in

the name of Deft. no.1 and after the deed of gift and deed of mortgage the name of deft. no.2 has been included therein. I produce 5 forms nos. I and XIV which are collectively marked at Exh.PW.1/D. I was in Africa when the survey was done. I returned in 1978. Then I have filed the present suit. The suit properties came to my father from my grandparents. The name of my grandfather was Jose Luis Correia on whose death also there was an Inventario bearing no.8478/1915."

36. In her evidence P.W.1 has further stated:

" In my absence in Africa, my mother, my brother and deft. no.1 were enjoying the suit property and whenever we were staying in the suit house. I was born in the said house."

In her cross-examination, P.W.1 has denied the suggestion that her father had not inherited any of the suit properties, but admitted that she had filed a list of assets in the inventory proceedings on the death of her father after the gift deed and the mortgage deed were executed by Defendant No.1. She has further stated that her brother Jose Brasiliano had filed the said inventory proceedings and given the list of assets as left by their father; that the properties mentioned in the list given by the brother are the same as the suit properties. The

brother has left the country in December 1979.

37. Learned Advocate for the Respondents has vehemently argued that the documents issued, namely, the certificate issued by the Civil Judge, Senior Division, in the inventory proceedings of 1915 cannot be looked into at all since there is no reference to it in the pleadings and submitted that no relief can be granted on Affidavits and documents not disclosed in the plaint. Further, that the suit based on one cause of action cannot be decreed on another cause of action. Reliance has been placed on the decisions in the following cases:-

(1) Allam Gangadhara Rao v. Gollapali Gangarao (AIR 1968 AP 291);

(2) Moinuddin v. Ch. Mohammad Imam-Uddin Ashraf (AIR 1972 All. 25); and

(3) Duggi Veera Venkata Gopala Stayanarayana v. Sakala Veera Raghavaiah & anr. (AIR 1987 SC 406).

38. The learned Counsel for the Respondents has further submitted that the Plaintiff sought

amendment of the plaint by adding para 10(a) to (e) and the only reference made is to inventory proceedings of 1978 in respect of the property belonging to Nonato Damiao Correia, the father of the Plaintiff and, therefore, the contention that the properties belonged to Jose Luis Correia, i.e. grandfather of the Plaintiff, has no relevance whatsoever. On the other hand, the learned Counsel appearing on behalf of the Plaintiff has stated that the Plaintiff has specifically pleaded in the plaint that she is a co-owner. By amendment, she brought on record her title as absolute owner of the property left by her father in the inventory proceedings of 1978. The pleadings cannot be said to be contradictory or at variance with each other. Further, it is pointed out that under Order VI, Rule 2 of the Civil Procedure Code pleadings need only state material facts and not the evidence. Reference is made to the case of **Bhagwati Prasad v. Chandramaul** (AIR 1966 SC 735). In Para 10 Their Lordships observed:-

" If a plea is not specifically made and yet it is covered by an issue by implication, and the parties knew that the said plea was involved in the trial, then the mere fact that the plea was not expressly taken in

the pleadings would not necessarily disentitle a party from relying upon it if it is satisfactorily proved by evidence. The general rule no doubt is that the relief should be founded on pleadings made by the parties. But where the substantial matters relating to the title of both parties to the suit are touched, though indirectly or even obscurely, in the issues, and evidence has been led about them, then the argument that a particular matter was not expressly taken in the pleadings would be purely formal and technical and cannot succeed in every case. What the Court has to consider in dealing with such an objection is: did the parties know that the matter in question was involved in the trial, and did they lead evidence about it? If it appears that the parties did not know that the matter was in issue at the trial and one of them has had no opportunity to lead evidence in respect of it, that undoubtedly would be a different matter. To allow one party to rely upon a matter in respect of which the other party did not lead evidence would introduce considerations of prejudice, and in doing justice to one party, the Court cannot do injustice to another. "

39. To substantiate the claim of the plaintiff the plaintiff examined herself and deposed as follows:

The properties referred to in para 1 of her deposition belonged to her father by name Nonato Damiao Correia. On his death, inventory took place bearing no.86/78. The said properties have been allotted to her in the said inventory proceedings. She produced the certificate which included mapa de partilha and allotment of shares which were collectively taken on record and marked as Exh. P.W.1/A. The suit properties had been allotted to her in the said inventory under verba nos. 13, 14, 15, 18 and 19. The Plaintiff further deposed that the Defendant No.1 who is dead, was her father's brother. The suit properties came to her father from her grandparents. The name of her grandfather was Jose Luis Correia, on whose death there was an inventory bearing no.8478/15. She produced the statement of the 'cabeca de casal' in the said inventory, the description of the properties, mapa de partilha and judgment which were collectively taken on record, in 5 pages and marked as Exhibit P.W.1/E. The items allotted therein to her father are item no.13, half of item no.15 and half of item no.16. The property 'Gorbata' is described at item no.13. Jose Brasiliano Correia is her brother. There was a suit between her brother and defendant no.1. As

the defendant no.1 was to sell a house that existed in survey no.147/12, her brother had filed the said suit against him. In view of the undertaking given by defendant no.1. in the said civil suit, the suit was ordered and defendant no.1 was restrained from selling the house. Exhibit P.W.1/F is the copy of the order in the said suit.

40. Thus it is clear that the Defendants were aware of the Plaintiff's claim and the Plaintiff has led evidence to substantiate her said claim and, therefore, just because the pleadings do not set out details pertaining to the inventory proceedings of 1915, it cannot be said that there were no pleadings on which the issue could be decided. The pleadings being implied from the very nature of the suit and the claim of the Plaintiff, and the parties being aware of the said issue involved in the trial and though the same was not expressly taken in the pleadings, the same would not necessarily disentitle the party from relying upon it if it is satisfactorily proved by evidence.

41. P.W.2 Adelina Fernandes, deposed that she knows the Plaintiff and the Defendants. The

Defendant No.1 died sometime in November, 1984. He was residing in the ancestral house of the Plaintiff. The Defendant was the brother of the Plaintiff's father Nonato Damiao Correia. The Defendant was living alone and prior to that one person known as uncle Sebastiao was residing in the said house. The said Sebastiao is the brother of Nonato and the Defendant. They have more properties.

42. The Defendant No.2, Anita D'Souza, was 33 years old on the date of her examination in Court. Anita has deposed that she knew the Defendant no.1 for the last about 22 years, since the time she gained knowledge. According to her, defendant no.1 died on or about 16th November, 1984. He died at the age of 91. He was not married.

43. However, in her depositions he has claimed ignorance about the relations between her parents and the deceased Condorcet. In cross-examination too, when she was asked about the relations between the plaintiff and Condorcet she expressed her ignorance. She has also expressed ignorance about the marriage of the plaintiff as also divorce. She admitted that

Condorcet was not related to her. She further deposed that on the basis of the survey which was shown to her being in the name of Condorcet and for that reason and because he was enjoying the said properties, she stated that he was the owner of the property. She specifically admitted in cross-examination that she has not seen any other document. She has also expressed ignorance about the suit filed by the plaintiff's brother against Condorcet.

44. In the written statement filed by the defendant no.1 Condorcet, in para 2 of the statement it is stated as follows:-

"With reference to para 1 of the plaint this defendant denies that there are co-owners to the properties mentioned in para 1 of the plaint sub-paras (a) to (e). This defendant states and maintains that he was the sole and exclusive owner of the abovementioned properties (a) to (e) under the title or in the alternative by positive prescription."

45. The Defendant submits that he has been enjoying the properties mentioned in (a) to (e), as owner, for more than 40 years, openly, peacefully and uninterruptedly with animus

domini.

46. On the basis of the pleadings of the Defendants, Issue no.4 was framed and the burden of proving the same was on Defendant no.1, Issue No.4 reads as under:-

" Whether the defendant no.1 proves that all the suit properties were enjoyed by him exclusively, peacefully and uninterruptedly with animus domini for more than 40 years having acquired right to them by prescription ?"

47. The learned trial Judge has discussed issue No.4 in para 14 of his judgment. After discussing the pleadings, evidence and the documents placed on record, learned Trial Judge arrived at the conclusion that the defendant no.1 has failed to prove issue no.4.

48. Reference is made to the evidence of D.W.1 Anita D'Souza (Defendant No.2) who had stated that she knew defendant no.1 for the last 22 years since the time of her knowledge. He died on 16-11-1985. Her house and the defendant no.1's house have a common wall. Relations between her parents and the said Condorcet were

very good. He had died at the age of 91 years. She and her mother were providing for the maintenance of the said Condorcet. That during his lifetime the said Condorcet, Defendant No.1, it was the defendant No.1 who was enjoying the suit properties. The learned trial Judge has observed that the deceased defendant No.1 in his written statement had taken a stand that he acquired the suit properties by way of prescription and that he was in possession of the suit properties for the last 40 years. However, D.W.1 Anita D'Souza, the beneficiary of the said properties, has not led any evidence to this effect.

49. Further, D.W.2, Vinayak Shirodkar, in his deposition has stated that he had seen Condorcet residing in the suit plot when he was of the age of 40 to 50 years. D.W.3 Mathias D'Sa has stated that he knew the said Condorcet for the last about 40 years.

50. The learned trial Judge found contradictions in the said evidence regarding possession of the suit properties by defendant no.1. She noted that in the written statement, the deceased defendant no.1 has nowhere mentioned

that that he enjoyed the suit properties for the last 40 years. Looking to the evidence adduced, the trial Judge held that it could not be said that the defendant no.1 enjoyed the properties by adverse possession. Further reliance was placed upon Form I & XIV produced by the plaintiff showing the name of the defendant no.1 in the Occupant's column. Hence it is concluded by the learned trial Judge that it could not be said that the defendant no.1 had acquired any prescriptive rights to the suit properties. Hence the said Issue no.4 was answered in the negative.

51. On going through the evidence of the said witnesses, it is seen that not only are there discrepancies in the evidence of defence witnesses but that no part of the evidence adduced by the said witnesses could be said to substantiate the deceased Defendant No.1's claim to adverse possession for the last 40 years. Therefore, it could not be said that the deceased Defendant was the absolute owner of the said properties to the exclusion of the other co-owners. We have no difficulty in accepting this finding of the learned trial Judge, as the Defendants on whom the burden of proving the

issue was, failed to prove the same.

52. So far as the Plaintiff's claim to co-ownership of the suit properties along with Defendant No.1 and others (Issue No.1) and the subsequent claim of absolute ownership pursuant to the allotment in the inventory proceedings of 1978 (Issue No.8), it must be stated that there is no contradiction in the stand taken up by the Plaintiff. Originally these properties being ancestral, were of the co-ownership of the Plaintiff and Defendant No.1 and other heirs, as has been amply borne out in the evidence of P.W.1 herself and the evidence of the Plaintiff on this aspect has not been shaken. The contention of the Respondents that the pleadings being silent on this aspect of the properties being ancestral properties which were subject-matter of the inventory proceedings in 1915, is without merit, as the bundle of facts constituting cause of action for filing the suit are implied in the very claim of the Plaintiff as one of the heirs and also in the claim of the deceased Defendant No.1 by way of possession which initially was as co-owner along with deceased Defendant No.1, Plaintiff and others. Defendant No.1 had set up the claim to absolute ownership by prescription

only with a view to justify the documents executed by him in favour of Defendant No.2. Defendant No.1 has not denied his possession as co-owner nor has he proved ouster of the other co-owners. These being ancestral properties, and he being one of the heirs, his ownership, of course, would be that of co-owner. It is not Defendant No.1's case that he is an absolute owner by title but that he is an owner by prescription as he has been continuously residing in the said premises for over 40 years to the exclusion of the other co-owners. This claim to absolute ownership of the suit properties by way of adverse possession has been rejected as the Defendants have failed to substantiate the same. Even otherwise, mere residence in the house and occupation of the other properties by itself does not amount to an ouster of the other co-owners.

53. The Plaintiff has beyond reasonable doubt proved that the suit properties are joint family properties in respect of which the deceased Defendant No.1 was a co-owner along with the Plaintiff and other heirs. Even if the Plaintiff's claim to absolute ownership under the inventory proceedings is negated, the fact remains that the Plaintiff still is a co-owner of

the said properties along with Defendant No.1 and others. Defendant No.1 being only a co-owner and not absolute owner, had no right to mortgage, gift or dispose of the said properties without the consent of other co-owners.

54. As stated earlier, the learned trial Judge has not decided Issues No.1 and 8 on the evidence produced and as Issues of fact, but as Issues of law. She has not dealt with the evidence produced by the plaintiff to prove her title as co-owner or absolute owner. After observing that there were contradictions in the pleadings, viz. on one hand the plaintiff claiming to be co-owner, and on the other, claiming to be absolute owner, learned trial Judge held that the Plaintiff has failed to prove the said Issues and held that the suit was not maintainable because the plaintiff had not sought declaration that she is a co-owner of the suit premises or that she was absolute owner of the suit premises and without seeking such declaration, the suit was not maintainable in law. Thus, the learned trial Judge has not decided the said two Issues No.1 and 8 which are issues of fact on the evidence produced. On perusal of the evidence of the plaintiff, it is

seen that the plaintiff has abundantly proved, if not her absolute ownership to the properties, at least her right as co-owner of the properties along with the defendant no.1 and the other co-owners and, therefore, the trial Judge ought to have answered the Issues No.1 in the affirmative. Issue No.8 regarding absolute ownership of the Plaintiff is not at all material for granting the main relief prayed for viz. setting aside the mortgage deed and gift deed in favour of Defendant No.2. Further, the learned trial Judge while considering the Issues No.1 and 8 has not at all discussed the inventory proceedings of 1915, certified copy of which was placed on record, and also exhibited in evidence. The trial Judge has rejected the plaintiff's case on the ground that the plaintiff has not mentioned the names of the other legal heirs besides the plaintiff and the defendant no.1 in the said properties. It may be noted that it was not necessary to mention the details of other co-owners as the plaintiff was not seeking any share in the property, but only a declaration that the said deeds, of mortgage and of gift, are null and void. The plaintiff's claim is that she is the co-owner and alternatively, absolute owner of the properties in view of the inventory

proceedings of 1978 and therefore the other co-owners, namely, Condorcet had no right to sell or alienate the property without the consent of other co-owners. Furthermore, possession of one co-owner cannot be adverse to that of the other co-owners and as held in **Syed Shah Gulam Ghouse Mohiuddin & ors. v. Syed Shah Ahmed Mohiuddin Kamisul Qadri (dead) by his Legal Representatives & Ors.** (AIR 1971 SC 2184) wherein Their Lordships observed as follows:-

"Possession by one co-owner is not by itself adverse to other co-owners. On the contrary, possession by one co-owner is presumed to be possession of all the co-owners unless it is established that the possession of the co-owner is the denial of title of co-owners and the possession is in hostility to co-owners by exclusion of them. In the present case there is no evidence to support this conclusion. Ouster is an unequivocal act of assertion of title. There has to be open denial of title to the parties who are entitled to it by excluding and ousting them."

55. Further, Article 1566 of the Portuguese Civil Code, (Preferential Right of the Co-owners)

recites as follows:-

" The Co-owners of an indivisible or undivided property shall not sell to a third party their respective share, if a co-partner wants it for as much. "

Article 2177 reads as follows:-

" The co-proprietor cannot, however, dispose specifically of any part of the common object, without it being allotted to him in partition and the assignment of right which he has to the part which would belong to him, may be limited to in conformity with the law."

56. The finding of the learned trial Judge on Issues Nos. 1 and 8 requires to be set aside.

57. The learned trial Judge has correctly decided Issue No.4 i.e. the claim of defendant No.1 to absolute ownership as the defendant has failed to prove the said issue by documentary or other evidence. That being the position, it is clear that defendant No.1 had no right to execute the documents, mortgaging or gifting the said properties in favour of defendant No.2 without

the consent of other co-owners and, therefore, the said two documents will have to be set aside as null and void.

58. It is the case of the plaintiff that the said documents were executed under undue influence and are a fraud committed on the co-owners by the defendant No.2. However, the genuineness of the signatures of the defendant no.1 on the said documents has not been challenged and it is the case of the defendants, therefore, that this being a suit under Section 31, the same is not maintainable as the documents themselves have not been challenged. This argument of the defendants is covered by the Issues No. 2 and 3 namely, "Whether the said suit is maintainable not being one under Section 31 of the Specific Relief Act ?" The trial Judge has answered Issues No.2 and 3 in the negative holding that the plaintiff has failed to prove that the mortgage deed and the gift deed executed by defendant no.1 in favour of defendant no.2 in respect of the suit properties are null and void. In deciding the said issues, the learned trial Judge seems to have been influenced by the entries in the survey records. It is pointed out that the plaintiff herself has in her deposition

stated that initially all the properties in the Survey records were in the name of defendant No.1 and after the deed of mortgage, the name of the defendant No.2 has been included therein. And the fact remains that the plaintiff has not challenged the entries in the Survey records nor the survey records have been challenged in her absence while she was in Africa by her brother and mother who were enjoying the suit properties and staying in the suit house. The learned trial Judge has also observed that the plaintiff has not set out the grounds of challenge to both the documents, namely, mortgage deed and the gift deed, executed by defendant No.1 in favour of defendant No.2 and she has also not sought a declaration of her title to the suit properties. The plaintiff has not proved that the said documents are sham documents. It is observed by the learned trial Judge that the plaintiff has not challenged the defendant No.1's statement in his written statement to the effect that he had mortgage the suit properties to defendant No.2 for Rs.20,000/- and since the plaintiff has not challenged this fact in the cross-examination of D.W.1, i.e. Defendant No.2 Anita D'Souza, it must be taken as admitted that the defendant No.1 received an amount of Rs.20,000/- from defendant

No.2 and the said documents were only executed as consideration for the sum received. Clearly, the conclusions of the learned trial Judge in deciding Issues No.2 and 3 in the negative are untenable. Mere entry in the Record of Rights does not prove title. The learned Advocate for the Respondents has contended that the Record of Rights reflects the case of the defendant No.1 as sole occupant of the suit premises. That there is presumption of correctness of entries in the Record of Rights. That this presumption was required to be rebutted by the plaintiff by adducing satisfactory evidence. That the Record of Rights shows lawfulness of possession by the defendant No.1. This was required to be rebutted by the plaintiff which the plaintiff has failed to do and, therefore, the trial Court has rightly held that the plaintiff has failed to prove her case and is not entitled to any relief. Be that as it may, there is no denying of the fact that the Record of Rights shows the defendant No.1 as the sole occupant and not as owner. What the defendant No.1 has sought to transfer to Defendant No.2 by the said documents of mortgage and gift is his alleged right in the said properties as absolute owner and not merely as a person in occupation or possession of the

properties. Further, it is well settled that the Survey Records cannot create or destroy title in the property. The mere fact, therefore, of the name of defendant No.1 appearing in the Record of Rights does not create any title in his favour. The documents are challenged on the ground that there was no consideration. That, in fact, the said documents are a fraud on the other co-owners as the said documents were got executed by the defendant no.2 from the Defendant No.1 by exercise of undue influence. There is nothing to show that there was consideration for the documents. Merely because the Plaintiff has not challenged the statement of defendant No.2 (D.W.1) in evidence that the said properties were mortgaged for Rs.20,000/- by itself cannot amount to proof that a sum of Rs.20,000/- was in fact paid as consideration and that even if it is taken as proved that the sum of Rs.20,000/- was paid as consideration, the fact remains that defendant No.1 not having absolute title to the property could not have executed the said documents in favour of defendant No.2, who was a total stranger to the estate which include the properties of ancestors of Plaintiff and defendant No.1 and other heirs. As held earlier, the learned trial Judge has committed an error in

deciding the Issues No.1 and 8. Consequently, the trial Judge has committed an error in answering the Issues No.2 and 3 as well as she has failed to appreciate the evidence brought on record to the effect that the plaintiff was co-owner in the said properties and that the plaintiff as well as the defendant no.1 and other heirs are co-owners in the said property and, therefore the defendant No.1 had no absolute right in the said property and, therefore, could not have executed the said documents in favour of defendant No.2. Therefore the finding of the learned trial Judge on these two Issues Nos. 2 and 3 also requires to be set aside.

59. The question whether the trial Judge has rightly answered Issues No.5 and 6 in the affirmative holding that the suit is bad for non-joinder of the plaintiff's husband and non-joinder of other co-owners of the suit properties, strictly speaking, need not be gone into as the said Issues are not germane to deciding the suit, the suit being one for declaration that the said documents of gift and mortgage are null and void as the plaintiff who was only a co-owner and not absolute owner of the suit properties, could not have executed the said

documents in favour of defendant No.2. The trial Judge has held that the defendant has failed to prove absolute ownership to the suit properties by adverse possession as no sufficient evidence was produced to prove the said title of the defendant No.1. This Court, therefore, has found it not necessary to interfere with the findings of the learned trial Judge, i.e. that Defendant No.1 is the absolute owner Issue No.4). On the other hand, this Court has set aside the findings of the learned trial Judge on Issues No.1 and 8 pertaining to the rights as co-owner and/or absolute owner of the suit properties by the plaintiff, result being that the defendant No.1, who admittedly is only a co-owner, could not have executed the impugned documents of gift and mortgage and therefore the findings of the trial Court so far as Issues No.2 and 3 are concerned, have been set aside. The suit being one merely for declaring the said documents as null and void, joinder of plaintiff's husband and other co-owners of the suit properties is not necessary and the relief sought for can be granted without joining the said parties.

60. The only question that remains for consideration in the suit is an issue of law,

namely, whether the suit is maintainable not being one under Section 31 of the Specific Relief Act ?. In this connection, Learned Counsel Shri Lotlikar for the Respondents has strenuously argued that though the suit claims to be one under Section 31 of the Specific Relief Act, in fact and in substance it is one under Section 34 Specific Relief Act, 1963 and that since the plaintiff did not seek any consequential reliefs as required under Section 31 of the said Act, the suit cannot be said one under Section 31. Further that under Section 31, relief is discretionary and may be refused unless conditions are satisfied. It is pointed out that the suit seeks merely a declaration that the documents are null and void. The suit is not for cancellation of the said documents as contemplated under Section 31 of the Specific Relief Act and, therefore, the trial Court was right in holding that the plaintiff's suit was not maintainable under Section 31 of the Specific Relief Act, 1963 because the plaintiff had to first establish that she is co-owner of the property and based on such proof of co-ownership, she had to seek nullity of the said documents on the ground that her consent was not obtained. It is contended that the suit is essentially for a

declaration and, therefore, falls under Section 34 of the Specific Relief Act, 1963. Similarly, in respect of declaration of nullity of mortgage deed, it is submitted that the suit is liable to fail on the ground that the plaintiff has failed to seek consequential reliefs even though available. It must however be stated that no such contention or defence is taken up in the written statement. The said contention is being canvassed for the first time in appeal from the said order. Surprisingly, the learned trial Judge, while deciding Issues No.1 and 8, has negatived the said Issues not on the ground that the Plaintiff had not adduced sufficient evidence, but on the ground that the plaintiff had failed to prove the said Issues because she had not sought declaration that she is co-owner of the suit properties or absolute owner of the said properties and in the absence of that, the plaintiff's suit is not maintainable under law and in support thereof, she has relied upon the judgment in **Vamula Maniamma v Allugada Venkatamma and others [(AIR 1984 NOC 80 (Andhra Pradesh))]**, which has observed as follows:-

"Section 31 does not give a right to sue to all persons for cancellation. The section describes the class of persons who are given

the right to sue for cancellation of the written instrument and the circumstance in which they can so sue for cancellation. Such right is available only to persons who have a reasonable apprehension that such instrument if left outstanding may cause him serious injury and against whom a written instrument is void or voidable.

Where the said deeds, the cancellation of which was sought, were documents executed by third parties, in assertion of hostile independent title claimed by the vendors under those documents, held that the plaintiff's suit for cancellation of the documents was not maintainable. Plaintiff should have filed the suit for declaration of her title and consequential reliefs.".

61. On behalf of the Plaintiff, it is contended that the suit is essentially based under Section 31 of the Specific Relief Act, 1963 as the Plaintiff has reasonable apprehension that the documents, namely, the deed of mortgage and the deed of gift, which were allegedly concocted documents, if left outstanding, would cause serious injury and, therefore, the Plaintiff is entitled to have the said documents declared void or voidable. The reason for filing the suit for cancellation of the said documents was to remove

the cloud on the title of the Plaintiff on the said properties and the real cause was not assertion of the title but the removal of the cloud that was cast on the title of the plaintiff by the execution of the said documents. It is the contention of the plaintiff that the gift deed and the mortgage deed are void as the plaintiff was the co-owner of the said properties and later on, after the inventory proceedings of 1978, absolute owner. Defendant No.1 could not have mortgaged or gifted the said properties to a third person without joining the other co-owners including the plaintiff. Furthermore, that the said documents were executed by defendant no.1 in favour of defendant no.2, a total stranger to the properties. The relief sought under provisions of Section 34 is discretionary and it is not a must that declaration of status of right has to be sought from the Court. The foundation of the suit is the Plaintiff's right as co-owner, alternatively, as absolute owner of the property and that the Respondent Condorcet, Defendant No.1, was not entitled to dispose of the properties to anyone else though he was in possession. Therefore, the plaintiff has rightly filed the suit under Section 31 of the Specific Relief Act seeking declaration that the gift deed

and mortgage deed are null and void. Furthermore it may be pointed out that just because the pleadings do not fit within a straitjacket that does not mean that relief cannot be granted to a party if the basic ingredients for granting the same are present. In the present case, the plaintiff has reasonable apprehension that the documents, if left outstanding, would cause serious injury. That the said documents were, ex facie, void and, therefore, she was entitled to a declaration that the said documents, namely, the mortgage deed and the gift deed, be declared null and void and the same be delivered up and cancelled.

62. Another contention of the Respondents is that the Appellant had failed to establish the correlation between the properties, the subject-matter of 1915 inventory proceedings, and the suit properties. It is contended that it is not possible for the Appellant to make out any case of co-ownership without correlating the suit properties with the properties allotted in the inventory proceedings of 1915. It is contended that the properties mentioned in the plaint and in the inventory proceedings of 1978 and also in the chart not being one and the same, the

plaintiff failed to identify the properties which came in inheritance of plaintiff and defendant no.1 as co-owners of the said properties. There appears to be some substance in this contention, as the property shown in the inventory proceedings of 1915 and 1978 and the subsequent survey proceedings do not tally. However, discrepancies, if any, are not of much consequence since the defendant Condorcet had specifically admitted the inheritance and further claimed that the other co-owners had relinquished their share. That, thereafter, he spent lot of money in the repairs and construction and that the other co-owners have no right as he had become the absolute owner. However, this claim has not been substantiated by him and, therefore, there is no substance in this objection taken up by the Respondents, which again it must be pointed out, has been taken up for the first time in the Appeal and not been taken up in the written statement in the trial Court.

63. In the circumstance, the appeal is allowed. The Order of the trial Court dated 23rd March 1993 passed in Special Civil Suit No.36 of 1980 by the Civil Judge, Senior Division, Mapusa is set aside and the relief claimed in the plaint

at prayer (a) is granted. The deed of mortgage dated 26-3-180 and the deed of gift also dated 26-3-180 are hereby declared null and void. They be delivered up for cancellation. The suit is decreed accordingly in terms of prayer (a). Copy of this Order be sent to the Registrar of Assurances, Goa, where the said documents have been registered or lodged for registration with a direction to the concerned Officer to make a note on the copy of the instrument in his Book of the fact of cancellation of the said instruments.

64. Since the suit has been filed by the Plaintiff as co-owner along with defendant No.1 and the other co-owners, the prayer for eviction and recovery of possession of the suit properties cannot be granted. Plaintiff is at liberty to take appropriate proceedings for the same.

65. Appeal stands disposed of.

(A.S. AGUIAR)
JUDGE.

66. On the application of the learned Advocate for Respondent No.2, stay of this Order for a period of six weeks.

(A. S. AGUIAR)
JUDGE.